Filed 6/8/17 Bannaoun Engineers Constructors Corp. v. CivilSource CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

BANNAOUN ENGINEERS CONSTRUCTORS CORPORATION,

Plaintiff, Cross-complainant and Appellant,

v.

CIVILSOURCE, INC.,

Defendant, Cross-defendant and Respondent.

G052891

(Super. Ct. No. 30-2014-00739525-CU-OR-CJC)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Frederick Paul Horn, Judge and Janet M. Christoffersen, Temporary Judge (pursuant to Cal. Const., art. VI, § 21). Affirmed.

Baker, Olson, LeCroy & Danielian and Eric Olson for Plaintiff, Cross-complainant and Appellant.

Murtaugh Meyer Nelson & Treglia, Madelyn A. Enright, Matthew W. Johnson and Thomas N. Fay for Defendant, Cross-defendant and Respondent.

* * *

INTRODUCTION

The City of Cypress (the City) entered into a contract with CivilSource, Inc. (CivilSource) to draft the plans for a street widening project. The City awarded the construction contract for the project to general contractor Bannaoun Engineers Constructors Corporation (Bannaoun). After a subcontractor sued Bannaoun and others on the ground it was not paid for its work on modifying a traffic signal for the project, Bannaoun cross-complained against, inter alia, CivilSource, alleging that flaws in CivilSource's plans resulted in project delays that caused Bannaoun to suffer damages. Bannaoun's claim against CivilSource was based on both tort and contract theories of liability. The trial court sustained CivilSource's demurrers to the claim against it in Bannaoun's third and fourth amended cross-complaints, without leave to amend, thereby respectively dismissing the tort and contract aspects of its claim against CivilSource.

We affirm. Bannaoun's claim, to the extent it seeks tort damages against CivilSource, is barred by the economic loss rule. The aspect of Bannaoun's claim seeking contract damages fails to allege sufficient facts to show Bannaoun was an intended third party creditor beneficiary of the City's contract with CivilSource to confer upon it standing to seek contractual damages against CivilSource. Bannaoun has not explained how it might amend its operative pleading to state a claim. The demurrer was therefore properly sustained without leave to amend.

BACKGROUND

I.

A SUBCONTRACTOR FOR THE PROJECT FILES A COMPLAINT.

In August 2014, KDC, Inc. filed a complaint against, inter alia, Bannaoun and the City, asserting claims arising out of KDC, Inc.'s role as a subcontractor in "a

work of improvement known as the Cerritos Avenue Widening Project" (the project). The complaint alleged that the City had awarded the original contract for the project to Bannaoun, and that Bannaoun had entered into a subcontract with KDC, Inc. by which KDC, Inc. agreed to install certain traffic signal modifications. KDC, Inc. filed the complaint after Bannaoun failed to pay it $48,086.36 for its work performed under the subcontract.

II.

BANNAOUN FILES AN AMENDED CROSS-COMPLAINT AND CIVILSOURCE SUCCESSFULLY DEMURS; BANNAOUN IS GRANTED LEAVE TO AMEND.

In October 2014, Bannaoun filed an amended cross-complaint for damages and declaratory relief against CivilSource and others. As pertinent to the issues in this appeal, the amended cross-complaint contained a single cause of action against CivilSource entitled "Breach of Duty to Perform Professional Services in Accordance With Standard of Skill and Care." It alleged CivilSource entered into a contract with the City that was "primarily written, but partially also oral and implied to prepare the Plan . . . in connection with the Project."

The amended cross-complaint further alleged, "As the preparer [of the Plan] CivilSource had a duty not only to the City but to others, including [Bannaoun], as a bidder on and later contractor under such documents" and that CivilSource "failed in its duty to prepare the same with the level of skill and care applicable to engineers performing such services" evidenced by "anomalies" present in the plan, including defects with regard to the design of a retaining wall. It further alleged CivilSource's "breach of duty" caused Bannaoun to "become embroiled in arguments with the City over payment with the result that payment has been delayed and, if the City's arguments prevail, would be denied, not because it did not perform what was contemplated in the Project, but because of the inadequacies in CivilSource's documents, and to incur

attorneys' fees and other costs in connection with its attempt to resolve the dispute with the City and recover the amounts to which it is entitled."

CivilSource demurred to the amended cross-complaint on the following grounds: (1) Bannaoun did not comply with the certificate of merit requirement mandated by section 411.35 of the Code of Civil Procedure; (2) the amended cross-complaint failed to state facts sufficient to constitute a cause of action against CivilSource because it did not have a contractual relationship with Bannaoun that would create a duty to Bannaoun; and (3) CivilSource, as a civil engineering firm, did not owe a duty of care to Bannaoun.

The trial court sustained CivilSource's demurrer because there was no allegation in the amended cross-complaint that Bannaoun filed a certificate of merit before filing its pleading, and Bannaoun conceded in its opposition to the demurrer that no such certificate had been filed. The court granted Bannaoun leave to amend.[1]

III.

CIVILSOURCE SUCCESSFULLY DEMURS AFTER BANNAOUN FILES THE SECOND AMENDED CROSS-COMPLAINT.

In January 2015, Bannaoun filed its second amended cross-complaint for damages and declaratory relief. The second amended cross-complaint added the allegation: "Cross Complainant has complied with the requirements of CCP § 411.35, having filed an Attorney's Certificate of Merit in the within action."

CivilSource demurred to the second amended cross-complaint on the ground Bannaoun failed to comply with the certificate of merit requirement of Code of Civil Procedure section 411.35 because the certificate of merit was not signed under penalty of perjury. The demurrer also reasserted the second amended cross-complaint failed to state facts sufficient to constitute a cause of action and was uncertain because

[1] The trial court analyzed the other grounds raised in CivilSource's demurrer in its order.

CivilSource did not have a contractual relationship with Bannaoun and did not owe a duty of due to care to it. The demurrer further asserted Bannaoun's claim against CivilSource failed because "recovery is barred under the economic loss rule."

The trial court sustained the demurrer to the fourth cause of action on the ground it failed to state facts sufficient to constitute a cause of action. The trial court granted Bannaoun leave to amend.

IV.

BANNAOUN FILES ITS THIRD AMENDED CROSS-COMPLAINT.

Bannaoun filed a third amended cross-complaint to which it attached the certificate of merit. The third amended cross-complaint's single cause of action against CivilSource was re-titled: "Breach of Contract and Tort Duty to Perform Professional Services in Accordance With Standard of Skill and Care" and added the following allegations in support of its claim: "The Plan was intended to define the work to be performed for the benefit of the City (as Owner) and others including Cross complainant. As the preparer of the Plan, Civil Source had a duty not only to the City but to others, including Cross Complainant, as a bidder on and later contractor under such documents."

The third amended cross-complaint further alleged: "Cross Complainant is a creditor third party beneficiary of the agreements between Civil Source and the City, which were expressly for the benefit of Cross Complainant as a general contractor bidding on and then entering into a contract with the City for performance of the work described in the Plan. The Plan is one of the Contract Documents as described in the contract between the City and Cross Complainant. The Plan is included as part of the performance of duties of the City to Cross Complainant.

". . . The expectation that Cross Complainant is a creditor third party beneficiary of Civil Source's undertaking in preparing the Plan and the foreseeability that Cross Complainant as general contractor and others similarly situated would rely on such

official Plan for the project made part of the bid documents and awarded contract is reinforced by the fact that not only do cases as early as 1977, but recognized as 'black letter law' authorities . . . state as black letter law state the existence of such duties.

". . . By reason of the various anomalies referred to in this Cross Complaint and otherwise, Civil Source failed in its duty to prepare the same with the level and skill care applicable to engineers performing such services with the result that it has caused Cross Complainant, while acting reasonably, to become embroiled in arguments with the City over payment with the result that payment has been delayed and, if the City's arguments prevail, would be denied, not because it did not perform what was contemplated in the Project, but because of the inadequacies in Civil Source's documents, and to incur attorneys' fees and other costs in connection with its attempt to resolve the dispute with the City and to recover the amounts to which it is entitled."

V.

CIVILSOURCE SUCCESSFULLY DEMURS TO THE CLAIM ASSERTED AGAINST IT IN THE THIRD AMENDED CROSS-COMPLAINT; THE TRIAL COURT SUSTAINS THE DEMURRER WITHOUT LEAVE TO AMEND ITS CLAIM AS TO THE TORT THEORY OF LIABILITY, BUT GRANTS LEAVE TO AMEND ITS CLAIM AS TO THE CONTRACT THEORY OF LIABILITY.

CivilSource demurred to the third amended cross-complaint's claim for breach of contract and tort duty to perform professional services in accordance with standard of skill and care, on the grounds the pleading was uncertain and failed to state sufficient facts to constitute a cause of action. The demurrer was based on the following: (1) there was no contractual relationship between CivilSource and Bannaoun and, therefore, no contractual duty existed between them; (2) the economic loss rule barred the claim; (3) Bannaoun was not a third party beneficiary of CivilSource's contract with the City and thus lacked standing to sue CivilSource for breach of contract; and (4) the

pleading improperly combined breach of contract and tort theories in a single cause of action.

The trial court sustained the demurrer without leave to amend Bannaoun's claim against CivilSource to the extent it was based on a tort theory, but sustained the demurrer with leave to amend as to the aspect of Bannaoun's claim against CivilSource that was based in contract. The court stated: "The court finds that this cause of action, as presently pled, fails to state facts sufficient to constitute a cause of action and is uncertain."

The court explained: "The cause of action labeled as the Fourth Cause of Action actually attempts to plead two causes of action: breach of contract founded upon third party beneficiary status, and a tort. [¶] '"[A] claim based on negligence or even strict liability will not lie where the wrong has resulted only in economic loss rather than actual damage to person or property.' [Citation.] [¶] Economic loss consists of 'damages of inadequate value, costs of repair and replacement of the defective product or consequent loss of profits without any claim of personal injury or damages to other property . . .' *Jimenez vs. Superior Court*, (2002) 29 Cal.4th 473, 482. [¶] Both sides have now had more than one opportunity to sufficiently plead or challenge the sufficiency of the tort claim based solely on economic loss, with much overlap in the authority cited in the demurrers and related filings. Minor changes were made to this cause of action as to the tort claim following the sustaining of the demurrer to this cause of action in the First Amended Cross-Complaint with leave to amend. Cross-complainant makes no viable offer of proof as to how this legal theory may be sufficiently pled against Civil Source in its current opposition, but, nevertheless, seeks leave to amend. [¶] Based on the authority cited and the de minimus changes in the cause of action following the demurrers, it does not appear likely that cross-complaint can sufficiently plead a tort cause of action against Civil Source. Therefore the demurrer to the tort cause of action within the Fourth Cause of Action is sustained without leave to amend. [¶] The demurrer

to the contract claim in the Fourth Cause of Action, currently founded on cross-complainant's claimed status as a third party beneficiary to the contract between City of Cypress and Civil Source is not sufficiently pled to constitute a cause of action sounding in contract, however, this is a new legal theory against Civil Source not previously pled. [¶] The demurrer to the contract portion of the Fourth Cause of Action is therefore sustained, with 15 days' leave to amend to allege a legally sufficient cause of action sounding in contract against Civil Source."

VI.

BANNAOUN FILES THE FOURTH AMENDED CROSS-COMPLAINT ASSERTING A SINGLE CLAIM AGAINST CIVILSOURCE SOLELY BASED ON A THIRD PARTY BENEFICIARY BREACH OF CONTRACT THEORY OF LIABILITY.

In May 2015, Bannaoun filed the fourth amended cross-complaint, alleging CivilSource prepared the plans for the project that was awarded to Bannaoun, a licensed contractor. The pleading generally alleged: "The essence of the Project was to widen Cerritos Avenue in the relevant area to correspond with its width in nearby areas. As part of this work the sidewalk was required to be relocated to encroach onto the adjoining private property at 5500-55400 W. Cerritos Avenue, Cypress, CA ('Adjoining Property') which had and has dirt 2-3 feet above the grade of the sidewalk. The Project called for a retaining wall (the 'wall') to be erected at the inner edge of the sidewalk where it abuts the Adjoining Property. The Plan shows, at page C-2 of the Plans, a Wall Detail, based on Standard Plan 613-3 which identifies a substantial foundation below the Wall and approximately 4 concrete blocks above the finished grade of the sidewalk of a height and design similar to a retaining wall between the sidewalk and the same Adjoining Property along a cross street, but not part of this Project. The Wall would be an appropriate size to act as a retaining wall for the 2-3 feet of dirt on the Adjoining Property. The Wall is over 100' long. Elsewhere on the Plan, however, are some fine print figures which, if taken literally to define the top of the Wall, would describe an uneven top, sometimes a few

inches above and sometimes a few inches below the finished grade of the sidewalk, which would leave most or all of the 2-3 feet of dirt unsupported. [Bannaoun] is informed and believes and thereon alleges that the true intent of all affected parties, including the City and the Adjacent Owners, was that the retaining wall was intended to be what is shown in the Wall Detail and sufficient to retain the 2-3 feet of dirt on the Adjoining Property and that any reasonable observer would consider the top if defined by the fine print figures described above to be absurd in context."

With respect to the single claim asserted against CivilSource in the fourth amended cross-complaint, now entitled "Breach of Contract (Third Party Beneficiary) to Perform Professional Services in Accordance with Standard of Skill and Care," the fourth amended cross-complaint further alleged: "14. (a) Civil Source entered into a contract with the City, primarily written, but partially also oral and implied to prepare the Plan (and, on information and belief, other documents) in connection with the Project. Civil Source was a principal design professional of the Plan. The Plan was intended to define the work to be performed for the benefit of the City (as Owner) and others including Cross Complainant. As the preparer of the Plan, Civil Source had a duty not only to the City but to others, including Cross Complainant, as a bidder on and later contractor under such documents."

"(b) Cross Complainant is a creditor third party beneficiary of the agreements between Civil Source and the City, which were expressly for the benefit of Cross Complainant as a general contractor bidding on and then entering into a contract with the City for performance of the work described in the Plan. The Plan is one of the Contract Documents as described in the contract between the City and Cross Complainant. The Plan is included as part of the performance of duties of the City to Cross Complainant.

"(c) The expectation that Cross Complainant is a creditor third party beneficiary of Civil Source's undertaking in preparing the Plan and the foreseeability that

Cross Complainant as general contractor and others similarly situated would rely on such official Plan[s] for the Project made part of the bid documents and awarded contract is reinforced by the fact that not only do cases as early as 1977 . . . but recognized 'black letter law' authorities . . . state the existence of such duties. . . . [T]he contract between the City as Owner and Civil Source did not purport to disclaim the existence of any third party beneficiary of the obligations contained in the contract.

"By reason of the various anomalies referred to in this Cross Complaint and otherwise, Civil Source failed in its duty to prepare the same with the level of skill and care applicable to engineers performing such services with the result that it has caused Cross Complainant, while acting reasonably, to become embroiled in arguments with the City over payment with the result that payment has been delayed and, if the City's arguments prevail, would be denied, not because it did not perform what was contemplated in the Project, but because of the inadequacies in Civil Source's documents, and to incur attorneys' fees and other costs in connection with its attempt to resolve the dispute with the City and recover the amounts to which it is entitled.

"By reason thereof Cross complainant Bannaoun has been damaged and will continue to be damaged by the failure of Cross Defendant Civil Source."

VII.

THE TRIAL COURT SUSTAINS CIVILSOURCE'S DEMURRER TO BANNAOUN'S CLAIM AGAINST CIVILSOURCE IN THE FOURTH AMENDED CROSS-COMPLAINT WITHOUT LEAVE TO AMEND; BANNAOUN APPEALS.

CivilSource filed a demurrer to the claim asserted against it in the fourth amended cross-complaint on the ground it did not state facts sufficient to constitute a cause of action and because the claim was uncertain.

The trial court sustained CivilSource's demurrer to the breach of contract claim in the fourth amended cross-complaint on the ground it failed to state facts sufficient to constitute a cause of action. The minute order states, in part, that Bannaoun

"does not challenge the legal sufficiency of this cause of action in the opposition, thereby conceding that this cause of action is not legally sufficient. To the extent cross-complainant instead advances that leave should be granted to amend the pleading to allege a cause of action founded in tort for the alleged misconduct in this cause of action, the court, at the hearing on the demurrer to the Third Amended Cross-Complaint, sustained the demurrer to tort claims without leave to amend, to which cross-complainant filed opposition and had the opportunity to advance its argument to the court within the context of the prior demurrer. [¶] The court declines cross-complainant's request for leave to file a new cause of action under a different legal theory."[2]

Judgment of dismissal was entered dismissing Bannaoun's fourth amended cross-complaint with prejudice as to CivilSource. Bannaoun appealed from the judgment of dismissal.

DISCUSSION

I.

STANDARD OF REVIEW

A judgment following the sustaining of a demurrer is reviewed under the de novo standard. (*McCutchen v. City of Montclair* (1999) 73 Cal.App.4th 1138, 1144; *Boccato v. City of Hermosa Beach* (1994) 29 Cal.App.4th 1797, 1803-1804.) Accordingly, we treat the properly pleaded allegations of a challenged complaint as true, and liberally construe them to achieve """substantial justice""" among the parties. (*American Airlines, Inc. v. County of San Mateo* (1996) 12 Cal.4th 1110, 1118.)

We consider only the allegations of a challenged complaint and matters subject to judicial notice to determine whether the facts alleged state a cause of action

---

[2] The trial court ruled that CivilSource's concurrently filed motion to strike was rendered moot.

under any theory. (*American Airlines, Inc. v. County of San Mateo, supra,* 12 Cal.4th at p. 1118.) "'Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.]'" (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.)

II.

THE TRIAL COURT PROPERLY SUSTAINED CIVILSOURCE'S DEMURRER TO THE TORT ASPECT OF BANNAOUN'S CLAIM AGAINST CIVILSOURCE AS CONTAINED IN THE THIRD AMENDED CROSS-COMPLAINT.

Bannaoun contends the trial court erred in sustaining CivilSource's demurrer to the third amended cross-complaint, without leave to amend, as to its claim against CivilSource based on a negligence theory. "'Actionable negligence involves a legal duty to use due care, a breach of such legal duty, and the breach as the proximate or legal cause of the resulting injury.'" (*Beacon Residential Community Assn. v. Skidmore, Owings & Merrill LLP* (2014) 59 Cal.4th 568, 573 (*Beacon*).) For the reasons we explain, the trial court properly sustained the demurrer challenging the tort aspect of Bannaoun's claim because it is barred by the economic loss rule.

A.

The Economic Loss Rule and Its Application to Negligence Claims in Construction Defect Cases.

In *Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979, 989-990, the California Supreme Court summarized the law governing the economic loss rule as follows: "Economic loss consists of '"'"damages for inadequate value, costs of repair and replacement of the defective product or consequent loss of profits—without any claim of personal injury or damages to other property. . . ."'"' [Citation.]' (*Jimenez v. Superior Court* (2002) 29 Cal.4th 473, 482.) Simply stated, the economic loss rule

provides: ‘“‘[W]here a purchaser’s expectations in a sale are frustrated because the product he bought is not working properly, his remedy is said to be in contract alone, for he has suffered only “economic” losses.’” This doctrine hinges on a distinction drawn between transactions involving the sale of goods for commercial purposes where economic expectations are protected by commercial and contract law, and those involving the sale of defective products to individual consumers who are injured in a manner which has traditionally been remedied by resort to the law of torts.’ [Citation.] The economic loss rule requires a purchaser to recover in contract for purely economic loss due to disappointed expectations, unless he can demonstrate harm above and beyond a broken contractual promise. [Citation.] Quite simply, the economic loss rule ‘prevent[s] the law of contract and the law of tort from dissolving one into the other.’ [Citation.]

“In *Jimenez v. Superior Court, supra,* 29 Cal.4th 473, we set forth the rationale for the economic loss rule: ‘“The distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the ‘luck’ of one plaintiff in having an accident causing physical injury. The distinction rests, rather, on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products.” [Citation.] We concluded that the nature of this responsibility meant that a manufacturer could appropriately be held liable for physical injuries (including both personal injury and damage to property other than the product itself), regardless of the terms of any warranty. [Citation.] But the manufacturer could not be held liable for “the level of performance of his products in the consumer’s business unless he agrees that the product was designed to meet the consumer’s demands.” [Citation.]’ (*Id.* at p. 482.)” (*Robinson Helicopter Co., Inc. v. Dana Corp., supra,* 34 Cal.4th at pp. 989-990.)

In *Aas v. Superior Court* (2000) 24 Cal.4th 627, 632, superseded by statute as stated in *Burch v. Superior Court* (2014) 223 Cal.App.4th 1411, 1417, the California

Supreme Court "[a]ppl[ied] settled law limiting the recovery of economic losses in tort actions," to the context of construction defect litigation and held the economic loss rule prevented homeowners from recovering damages for negligence from the developer, contractor, and/or subcontractors who built their residences unless the construction defects caused property damage or personal injury. The Supreme Court explained: "Speaking very generally, tort law provides a remedy for construction defects that cause property damage or personal injury. Focusing on the conduct of persons involved in the construction process, courts in this state have found such a remedy in the law of negligence. Viewing the home as a product, courts have also found a tort remedy in strict products liability, even when the property damage consists of harm to a sound part of the home caused by another, defective part. For defective products and negligent services that have caused neither property damage nor personal injury, however, tort remedies have been uncertain. Any construction defect can diminish the value of a house. But the difference between price paid and value received, and deviations from standards of quality that have not resulted in property damage or personal injury, are primarily the domain of contract and warranty law or the law of fraud, rather than of negligence. In actions for negligence, a manufacturer's liability is limited to damages for physical injuries; no recovery is allowed for economic loss alone. [Citation.] This general principle, the so-called economic loss rule, is the primary obstacle to plaintiffs' claim." (*Id.* at pp. 635-636, fns. omitted.)

B.

Because Bannaoun Alleges it Solely Sustained Economic Damages Due to CivilSource's Alleged Negligence, the Economic Loss Rules Bars its Claim.

Bannaoun has not alleged, and does not contend it could amend its pleading to allege, that it suffered property damages or personal injury damages as a result of CivilSource's alleged negligence in creating the plans for the project. Bannaoun's third

amended cross-complaint asserted CivilSource's alleged negligence caused Bannaoun "to become embroiled in arguments with the City over payment with the result that payment has been delayed and, if the City's arguments prevail, would be denied, not because it did not perform what was contemplated in the Project, but because of the inadequacies in Civil Source's documents, and to incur attorneys' fees and other costs in connection with its attempt to resolve the dispute with the City and recover the amounts to which it is entitled." These alleged damages do not qualify as damages to property or to the person. Consequently, Bannaoun's tort claim against CivilSource is barred by application of the economic loss rule.

Our conclusion is consistent with *State Ready Mix, Inc. v. Moffat & Nichol* (2015) 232 Cal.App.4th 1227, 1230. In that case, a concrete supplier prepared a bad batch of concrete that was used to construct a harbor pier. In order to recoup the cost of replacing the concrete, the concrete supplier filed a cross-complaint against the civil engineer who drafted the pier plans and helped the general contractor of the project by reviewing the concrete supplier's concrete mix designs. The trial court sustained, without leave to amend, the demurrer to the concrete supplier's cross-complaint for equitable indemnity or contribution for damages against the civil engineer on the ground it was barred by the economic loss rule. The appellate court held: "Like *Aas*, the economic loss rule bars State's cross-complaint because [the civil engineer] has no contractual relationship with [the concrete supplier] or [the general contractor] and no facts are alleged that the concrete injured a person or damaged other property." (*Id.* at p. 1232.)

In the reply brief, Bannaoun suggests the California Supreme Court in *Beacon, supra,* 59 Cal.4th 568, effectively overruled *Aas v. Superior Court, supra,* 24 Cal.4th 627 with regard to the application of the economic loss rule in construction defect cases, arguing: "It is thus clear that *Aas* and its progeny can no longer be relied on for the proposition that in a case such as this there can be no tort recovery for economic damage." The Supreme Court in *Beacon, supra,* 59 Cal.4th 568 at page 573, however,

limited the scope of its holding, stating: "This case is concerned solely with the first element of negligence, the duty of care." The court did not analyze the continuing viability of the economic loss rule. It expressly declined to decide whether the passage of the Right to Repair Act (Civ. Code, § 895 et seq.), which established a set of building and liability standards for new residential construction, abrogated the economic loss rule applied in *Aas* to litigation regarding such projects. (*Id.* at p. 578.) The Supreme Court stated, "According to defendants, the Legislature's limited purpose in enacting the Right to Repair Act in 2002 was to abrogate the 'economic loss rule' affirmed in *Aas*, *supra*, 24 Cal.4th 627, 636 [citation], not to otherwise create new tort duties. [¶] We need not decide whether the Right to Repair Act is itself dispositive of the issue before us. Assuming defendants are correct that the existence of a common law duty of care is required to maintain a negligence action under the statute, such a duty exists under the facts alleged here." (*Id.* at p. 578.)

The trial court did not sustain the demurrer to the tort claim on the ground CivilSource owned no duty of care in tort to Bannaoun. The court properly sustained CivilSource's demurrer to Bannaoun's tort claim as to the damages element because it is barred by the economic loss rule as supported by California Supreme Court precedent.

III.

THE TRIAL COURT PROPERLY SUSTAINED CIVILSOURCE'S DEMURRER TO BANNAOUN'S CLAIM CONTAINED IN THE FOURTH AMENDED CROSS-COMPLAINT SEEKING CONTRACT DAMAGES AGAINST CIVILSOURCE.

Bannaoun argues its claim based on a breach of contract theory should have survived demurrer because Bannaoun was an intended third party creditor beneficiary of CivilSource's contract with the City whereby CivilSource drafted the project's plans. Bannaoun's appellate briefing on this issue consists primarily of a series of quotes from various cases and treatises and fails to clearly argue how the fourth amended cross-complaint stated a viable claim against CivilSource.

Section 1559 of the Civil Code states: "A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it." Section 1559 "'excludes enforcement of a contract by persons who are only incidentally or remotely benefited by it.' [Citation.] [¶] A third party can have enforceable rights under a contract as either a creditor beneficiary or a donee beneficiary. [Citation.] 'A donee beneficiary is a party to whom a promisee intends to make a gift (i.e., a benefit the promisee had no duty to confer) of a promisor's performance.' [Citations.] . . . [¶] 'A creditor beneficiary is a party to whom a promisee owes a preexisting duty which the promisee intends to discharge by means of a promisor's performance.' (*Souza*[*v. Westlands Water Dist.* (2006)]135 Cal.App.4th [879,] 894; see also *Martinez*[*v. Socoma Cos.* (1974)] 11 Cal.3d [394,] 400 ['[a] person cannot be a creditor beneficiary unless the promisor's performance of the contract will discharge some form of legal duty owed to the beneficiary by the promisee'].)" (*Lake Almanor Associates L.P. v. Huffman-Broadway Group, Inc.* (2009) 178 Cal.App.4th 1194, 1199-1200, fn. omitted.)

"Ascertaining whether there was intent to confer a benefit on plaintiff as a third party beneficiary is a question of ordinary contract interpretation. [Citation.] In interpreting a contract, we give effect to the parties' intent as it existed at the time of contracting. [Citations.] 'Intent is to be inferred, if possible, solely from the language of the written contract. [Citations.]' [Citation.] In construing a contract, the court looks to '"the circumstances under which it was made, and the matter to which it relates."' [Citation.] "In determining the meaning of a written contract allegedly made, in part, for the benefit of a third party, evidence of the circumstances and negotiations of the parties in making the contract is both relevant and admissible." [Citations.] [¶] Additionally, a court may consider the subsequent conduct of the parties in construing an ambiguous contract. [Citation.] In determining intent to benefit a third party, the contracting "parties' practical construction of a contract, as shown by their actions, is important

evidence of their intent." [Citation.]' [Citation.]" (*The H.N. & Frances C. Berger Foundation v. Perez* (2013) 218 Cal.App.4th 37, 44-45.)

The fourth amended cross-complaint contains limited allegations regarding the terms of the contractual relationship between Bannaoun and the City, and is bereft entirely of allegations describing the contractual relationship between the City and CivilSource. It does not appear Bannaoun was expressly identified in the City's contract with CivilSource as a beneficiary (the contract itself was not attached to the fourth amended cross-complaint), and there are no allegations that the contract refers to the existence of any class of beneficiaries. In support of its argument it has pleaded third party creditor beneficiary status, Bannaoun does not explain in briefing, and did not allege in the fourth amended cross-complaint, how CivilSource's performance of its contract with the City would discharge some form of legal duty owed to Bannaoun by the City to render it a third party creditor beneficiary of CivilSource's contract with the City.

Bannaoun cites *COAC, Inc. v. Kennedy Engineers* (1977) 67 Cal.App.3d 916 (*COAC*) in support of its argument. In *COAC*, the appellate court stated "whether or not appellant is a creditor beneficiary of the contract as alleged between District and respondents depends upon the District's duties to appellant under the construction contract." *(Id.* at p. 920.) In that case, the successful bidder on a water treatment plant contract with a water district filed a complaint against the engineers who had also contracted with the district to prepare an EIR for the project but failed to do so in a timely manner. (*Id.* at p. 918.) The court held that the water district's contract with the bidder included an implied covenant that the water district would provide the successful bidder the EIR so that it could complete its work under the contract in a timely manner. (*Id.* at p. 922.) The water district attempted to discharge this duty by contracting with the engineers to prepare the EIR. (*Ibid.*) In light of allegations of the engineers' failure to timely prepare the EIR, coupled with allegations regarding the bidder's need for the EIR as a condition for its performance under the contract, the court held the complaint was

sufficient for the bidder to state a claim against the engineers in the capacity as a third party creditor beneficiary. (*Id.* at p. 921-923.)

This case is factually distinguishable from *COAC, supra*, 67 Cal.App.3d 916 because here, CivilSource's plans were already drafted before Bannaoun was awarded the contract by the City for the project. Bannaoun does not allege that it was not provided all documentation and plans required for it to perform under its contract with the City. It appears it encountered challenges and delays in executing the plans—plans that existed before Bannaoun was awarded the contract. There is no support for concluding Bannaoun, under these facts, qualifies as a third party creditor beneficiary with standing to sue CivilSource for breach of contract based on alleged deficiencies in CivilSource's plans.

The trial court, therefore, did not err by concluding Bannaoun failed to state a claim for breach of contract based on a third party creditor beneficiary theory.

IV.

BANNAOUN FAILED TO SHOW THERE WAS A REASONABLE POSSIBILITY IT COULD AMEND ITS PLEADING TO STATE A CAUSE OF ACTION, WHETHER BASED ON A CONTRACT THEORY OR A TORT THEORY, AGAINST CIVILSOURCE.

Bannaoun argues the trial court erred by failing to grant it additional leave to amend its claim against CivilSource as to both its tort and contract theories. When a demurrer is sustained without leave to amend, "we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; see *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

"Furthermore, where the plaintiff requests leave to amend the complaint, but the record fails to suggest how the plaintiff could cure the complaint's defects, 'the

question as to whether or not [the] court abused its discretion [in denying the plaintiff's request] is open on appeal . . . .' [Citation.] Because the trial court's discretion is at issue, we are limited to determining whether the trial court's discretion was abused as a matter of law. [Citation.] Absent an effective request for leave to amend the complaint in specified ways, an abuse of discretion can be found '"only if a potentially effective amendment were both apparent and consistent with the plaintiff's theory of the case." [Citation.]'" (*Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 507, overruled in part on other grounds in *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 939.)

In *Lincoln Property Co., N.C., Inc. v. Travelers Indemnity Co.* (2006) 137 Cal.App.4th 905, 916, the appellate court held: "[W]e find no abuse of discretion in the trial court's denial of leave to amend. Although [the plaintiff] has consistently requested leave to amend, it has never suggested what facts it is prepared to allege that would cure the defect in its complaint. There is nothing in the record that suggests that [the plaintiff] could amend its complaint to state a cause of action which would not similarly be barred by the judgment in the prior . . . action."

Here, Bannaoun failed to show what facts it might allege if given the opportunity to again amend its operative pleading. In its opening brief, Bannaoun's entire argument on this point, copied verbatim from both its opening brief and reply brief, is as follows: "Liberality in permitting amendment is the rule, if a fair opportunity to correct any defect has not been given [citation]. In this case no opportunity was given to amend after the discovery by counsel for the *Beacon* [*Residential Community Assn. v. Skidmore, Owings & Merrill LLP*, *supra*, 59 Cal.4th 568] case, the most recent leading case in the area."

It is puzzling Bannaoun contends it was not provided sufficient opportunity to amend its pleadings in light of the *Beacon* case, given that *Beacon* was filed in July 2014, the third amended cross-complaint was filed in March 2015, and the fourth

amended cross-complaint was filed in May 2015. In its appellate briefing filed in 2016, Bannaoun still fails to identify how it would amend its pleading, in light of *Beacon* or otherwise, to state a claim against CivilSource.

Bannaoun has therefore failed to carry its burden of showing there is a reasonable possibility the defects in the pleading of its claim asserted against CivilSource, whether based in tort or contract, can be cured by amendment. We therefore conclude the demurrers were properly sustained without leave to amend.

DISPOSITION

The judgment is affirmed. Respondent shall recover costs on appeal.

FYBEL, J.

WE CONCUR:

ARONSON, ACTING P. J.

IKOLA, J.